

The Return of the Sovereign: A Look at the Rule of Law in Hungary – and in Europe

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Renáta Uitz Mi 5 Apr 2017

Spring arrived in Budapest with sunshine, magnolias in full bloom, hordes of stag partiers from the U.K. – and a sovereign ready to fight against foreign invaders by legal means. After a lengthy media and political campaign against migrants, foreign influence and George Soros, the Hungarian government resorted to a surgical strike via lawmaking. The first bills of the spring seek to regulate foreign universities and civil society organizations receiving foreign funds with new-found vigor and persistence. This regulatory campaign is launched in the spirit of reclaiming national sovereignty. Were the Hungarian government to succeed in its recent efforts, it may well seriously shatter whatever is left from the rule of law in Europe.

A new law and an alleged bill

On Sunday, April 2, 2017 thousands of Hungarians spent their afternoon demonstrating against the impending amendment of the national higher education law (Act no. 204 of 2011). The amendment became law with the speed of light: [the bill](#) was tabled on March 28, 2017 and was passed by the Hungarian Parliament in a procedure of exceptional urgency on April 4, 2017 amidst intense international and domestic protest.

The disputed amendment sought to introduce brand new conditions for the operation of universities accredited outside the EU (foreign universities in the terminology of the bill) in Hungary. According to the reasoning of the Minister of Education who tabled the bill, the amendment aims to regulate third-country (non-EU) universities, as their operation is significant for Hungary's international relations, and because the movement of scholars and students presents a genuine national security concern.

Among several other conditions the amended law requires foreign universities to maintain a campus in the jurisdiction which has accredited them. The Hungarian government's concern is that without a campus in the accrediting company, the foreign accreditation agency does not continue to exercise quality control over these institutions. Also, a foreign university may be established solely on the basis of an international agreement concluded by the Hungarian government and the jurisdiction which accredited the institution.

By the time the protesters got home on Sunday, they found out from a news portal that the government [appears to have a bill ready](#) to discipline civil society organizations receiving foreign funds. The leaked document which very clearly resemble a bill has not yet been tabled. The idea is to have NGOs which receive more than 7.2M HUF (approx. 24.800 USD / 23.200 EUR) to register themselves with the government as "foreign funded" NGOs. The measure is justified in the name of the fight against money laundering and international terrorism, and is placed in the legal framework of existing rules against money-laundering. According to the preamble of the bill, civil society organizations may be used in Hungary by unknown foreign interest groups to influence Hungarian politics against the interests of the Hungarian people and thus endanger the "influence free operation" of legal institutions.

In the meantime, the self-defending sovereign seeks to gain support to warding off foreign influence in a freshly launched National Consultation. A National Consultation is a direct mailing campaign surveying Hungarian citizens on "important national questions." (It is not to be mistaken for a referendum or plebiscite.) In this round the government seeks to stop Brussels from abolishing the reduction of utility fees and imposing illegal migrants on Hungary, while it also seeks to enhance the financing of civil society organizations. According to the secretary of state announcing the [latest survey](#) "[p]articipating in the national consultation is a strong manifestation of support for Hungary's independence."

The legal measures launched in April clearly fit in this rhetoric and mental framework of defending national independence and sovereignty from unwanted foreign influence. But what does this have to do with the rule of law? And why should anyone in Europe care?

Rule of law – rule by law?

The measures discussed in this post fail to meet even the most basic features of how legal rules are envisioned in a rule of law framework. The rules are not general or neutral: they target particular legal entities under the guise of general norms. Although the measures are justified by the need to control harmful foreign influence, they are hardly necessary or proportionate to the aims to be achieved. The manner and speed with which the amendment of the higher education law was passed is antithetical to the most basic premises of legal certainty. These rules single out particular legal entities chosen on the basis of political (in)convenience and subject these target organizations to special treatment serving arbitrary political aims.

The targets of the recent legal measures are organizations which are not government-funded (thus, not government-controlled) and appear to have a public presence which the government views to be harmful or at least dangerous to Hungarian national identity.

The amendment of the higher education law affects 28 institutions of higher education, out of which 27 do not meet the newly introduced conditions of operation. From the public discourse it transpired very quickly that the primary target of this legislative measure was Central European University, a private graduate university founded by George Soros. Sources in the ruling party regularly referred to CEU in the media as the Soros-university. The parliamentary debate on the bill made it evident that CEU indeed was the target of the measure.

The government's own communication has made it crystal clear that the leaked NGO bill fits in the Hungarian government's efforts to rid Hungary of Mr Soros's philanthropy. In the past few days voices in [the ruling party called on the Hungarian government](#) to refuse to pay the Hungarian Helsinki Committee (sic) which had won [a major case before the ECtHR](#) challenging the core of ideas of the Hungarian government's border control measures. This is a mild gesture compared to the political test balloons which suggested that Hungary should exit the European Convention on Human Rights.

In light of the above it would be hard to claim that the newly enacted or the leaked bill contain legal norms of general application. Despite the carefully crafted language of these bills and the conditions they set, it is clear for an observer familiar with the local context that these bills are political instruments targeting very specific legal entities. This is not to suggest that it is per se illegitimate for a government to re-regulate a market sector inhabited by a handful of actors. It is at least curious that e.g. the foreign universities affected by the newly adopted amendment had not been involved in the preparation of the bill, nor had they been invited to participate in the legislative process.

As for the necessity and proportionality of the legal measures against the foreign universities, it is important to note that the operation of these institutions has been well-familiar to the Hungarian authorities. In the heat of the protest against the bill, the [Education Authority confirmed](#) that CEU had met the conditions of operation in Hungary under the existing legal framework. Thus, the regulatory impetus and especially the special emergency procedure with which the bill was passed in Parliament are hard to justify even at first sight.

As for the conditions in the amended higher education law, one cannot help but notice that the overwhelming majority of the affected institutions do not meet them at the time of their adoption and would also find it most challenging to comply with them in the immediate future. Under the newly passed amendment they would need to broker an international agreement and open a campus in a second country where they are not present at the moment. This is hardly a coincidence in the case of a bill which affects roughly two dozen institutions which are well-familiar to the very ministry which prepared the bill to re-regulate foreign actors in the education sector.

As for the conditions themselves, the idea that foreign universities can only operate in Hungary based on an

international agreement deserves special attention. This condition in and of itself introduces the sovereign to the picture with its might and *doubles* its weight. It is not only that the sovereign sets a condition, but it also takes the sovereign's benevolence for a foreign university to be able to meet this condition. If the Hungarian government were not in the mood to compromise with a foreign government on the principles of establishing a university, this statutory condition cannot be met by the organization to which it applies.

Furthermore, a [last minute rider](#) to the bill further specified this requirement: for federal entities the Hungarian government is expected to conclude an international agreement with the federal unit in which the university had been accredited, based on the prior approval of the respective federal government. Now, in case such a legal construct (i.e. a state-level treaty with prior federal consent) does not exist in the foreign jurisdiction in question, the condition for the operation of a foreign university set by Hungarian law simply cannot be met.

In brief, these adopted and planned laws are best seen as the decisions of a free-roaming sovereign striking its subjects at will, with the force of the law. This strategy is familiar in Hungary: when a new law on churches was enacted in 2011 to divest hundreds of religious organizations of their legal entity status, the reasons were clearly disclosed in the legislative debate: it is for Parliament, as the representative of the sovereign will of the people, to decide [who is a church and who is not](#). All the Hungarian government learnt since 2011 is that when selecting friends from foes, the sovereign is better off disguising its naked will and political preferences as a national security consideration or a counter-terror measure. Picking on universities and civil society organizations was certainly a smart move: unlike churches the legal entity status of which is considered to be part and parcel of freedom of religion in international and European human rights law, the jurisprudence on academic freedom or the freedom of association is much less developed. As a result, the sovereign may have a broader margin of appreciation to discipline unwanted organizations even in the eyes of a well-meaning regional court.

Why should the EU care?

Recent developments in Hungary have grave relevance for the EU, symbolic and political, as well as constitutional.

It is true that the Hungarian-born U.S. financier and philanthropist George Soros has been the favorite villain of the Hungarian government for years, but he is not the only one. The EU comes as a close second. Civil society organizations partly funded by Mr Soros' Open Society Foundations have received ample criticism as unpatriotic and destructive. The fact that the same NGOs would also accept funds in the EEA scheme (commonly known as Norwegian funds in Hungary) has singled them out for [continued governmental harassment](#) for years.

The draft NGO bill comes one step closer to vilifying EU money: when calculating the 7.2M HUF base-line, EU funding which is not distributed by Hungarian public institutions counts as funding of unknown origin. Thus, if an NGO receives funding from EU institutions directly, it is treated as potentially being under the influence of unknown foreign sources (draft NGO bill, Article 1(3)).

The symbolic and political relevance of recent Hungarian events was put succinctly by the [German President Frank-Walter Steinmeier to the European Parliament](#) on April 4, 2017:

"... if we want to be a lighthouse in the world for the rule of law and for human rights, then we cannot ignore, when these foundations are shaken in the midst of Europe. Europe, then, must not be silent, when civil society, even academia – as now at Central European University, Budapest – are deprived of the air to breathe."

These are important words at a time when European political leaders are still indebted to the Hungarian Prime Minister for putting his weight behind Donald Tusk as the president of the European Council. Prime Minister Orbán, as a true European citizen, said that his priority was [Europe's operability](#), despite the Polish government's

disapproval. It is in this light that the leaders and the members of the European People's Party (as well as their voters) may wish to consider President Steinmeier's words.

On the constitutional level, one may see the awakening of the Hungarian sovereign as a testing of the limits of the European constitutional construct, using the leeway given to the member states to define and defend their national identities under TEU Article 4(2). Article 4(2) as part of the script on subsidiarity, a foundational premise of the EU. Foundational as it may be, it competes with forces which pull towards defining and defending a European constitutional core.

So far much ink has been spilled on reconciling national constitutional identity with the premises of the common European constitutional project. It is time to pay closer attention to the national security exception, which Article 4(2) makes the "sole responsibility" of the member states. If used lightly and carelessly, the national security exception can be a much stronger centrifugal force in Europe than cries of constitutional identity could ever be.

It is hardly by accident that these new Hungarian legal measures are phrased in terms of national security and counter-terrorism. They appeal to the constitutional exception in Article 4(2) as well as to the sentiments of those governments which have been targeted by terrorist attacks. Foreign observers and their governments will be sympathetic to such reasons in the age of global terror and will not be ready to suspect foul play when the sovereign speaks the language of the law. After all, many such observers live in countries where charities and private foundations are used by the supporters of global terrorism to channel funds. From there it may be hard to fathom that in other countries the unwanted foreign influence is the one which defends such ideals as the rule of law and fundamental rights from invasions by its very own government. Therefore, it is all the more important that European constitutional and political actors realize: The carefully crafted new Hungarian laws use the cloak of national security to stab the rule of law, as understood in Europe, in the heart.

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